UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

VITA-MIX CORPORATION, VITA-MIX MANAGEMENT CORPORATION, and VITA-MIX MANUFACTURING CORPORATION,

Plaintiffs,

v.

BLENDTEC, INC.,

Defendant.

Civil Action No. 1:15-cv-01118-PAG

Judge Patricia A. Gaughan

BLENDTEC'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT OF NON-INFRINGEMENT

Defendant Blendtec, Inc. ("Blendtec") respectfully submits this memorandum in support of its motion seeking summary judgment that Blendtec does not infringe the patent-in-suit either literally or under the doctrine of equivalents.

Pursuant to Local Rule 7.1(f), the undersigned hereby certifies that this case has been assigned to the "complex" case management track under the Court's Case Management Order (Dkt. 25), and that the following memorandum, exclusive of the table of context, table of authorities and cover sheet, complies with the page limitations for dispositive motions under the complex case track.

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I. INTRODUCTION

Before Vita-Mix's '004 patent issued, Blendtec did precisely what the United States Patent Laws encourage: it redesigned its Wildside jar to ensure it would not infringe the claims of the '004 patent, all of which require a bottom surface periphery having "only one line of symmetry."[1] The law demands no more. The undisputed facts establish that Blendtec discontinued the original Wildside jar and did not make, use, sell, or offer to sell that jar after the '004 patent issued on June 17, 2014. Thus, there can be no infringement liability based on the Wildside jar. As to the redesigned Wildside+ jar, even Vita-Mix's expert concedes that the bottom surface periphery does not literally have a line of symmetry. There is, accordingly, no literal infringement by the Wildside+ jar. Finally, Vita-Mix is legally barred from asserting that the Wildside+ jar infringes under the doctrine of equivalents based on three independent legal doctrines: prosecution history estoppel, claim vitiation, and the disclosure-dedication rule. The Court should enter summary judgment of non-infringement.

II. FACTUAL BACKGROUND

In June 2001, Vita-Mix filed a provisional patent application for certain blending container designs conceived by inventor Brent Miller. *See* U.S. Patent No. 8,753,004, cover page (Ex. 1) ("the '004 patent"). For more than 13 years thereafter, Vita-Mix filed and pursued several continuation applications, making several amendments to the written description of the invention along the way, until the Patent Office finally issued the '004 patent on June 17, 2014. *See generally* Dkt. 29-43 through Dkt. 29-61.[2] Vita-Mix accuses Blendtec's WildSide jar,

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[1] *See, e.g., Read Corp. v. Portec, Inc.*, 970 F.2d 816, 828 (Fed. Cir. 1992) ("We have often noted that one of the benefits of the patent system is the incentive it provides for 'designing around' patented inventions, thus creating new innovations."); *Hilton Davis Chem. Co. v. Warner-Jenkinson Co.*, 62 F.3d 1512, 1520 (Fed. Cir. 1995) (en banc) ("Designing around is the stuff of which competition is made and is supposed to benefit the consumer.") (internal quotes omitted).

[2] In the interest of efficiency and to avoid unnecessary duplication, where appropriate, Blendtec cites the evidence submitted with its Motion for Summary Judgment Re: Issue Preclusion and Priority Date to establish some of the

WildSide+ jar, and Mini WildSide jar[3] of infringing the '004 patent. The following evidence establishes the material undisputed facts that compel summary judgment of non-infringement.

A. THE '004 PATENT AND ASSERTED CLAIMS

Every independent claim[4] of the '004 patent requires the blending jar to have a "bottom surface having a periphery defining only one line of symmetry." *Id*. at claims 1, 9, 14, 20, 24, 28, 33, 43. The Court construed the term "bottom surface having a periphery" to mean the "container's interior bottom surface having a periphery." Claim Const. Order at 2 (Dkt. 45). Accordingly, to infringe any claim of the '004 patent, the interior periphery of the bottom surface of the blending container must possess only one line of symmetry.

B. PROSECUTION HISTORY OF THE '004 PATENT

The "only one line of symmetry" limitation was added to the claims by amendments made in 2009 and 2010. A detailed chart of the amendment history of each independent claim in the '004 patent is provided in Exhibit 2 to this Motion. Blendtec will focus the arguments in this Motion on claims 1 and 33 as representative of all independent claims.

Claim 1 of the '004 patent was originally presented as application claim 1[5] and contained no limitation on the symmetry of the bottom surface:

> 1. (Original) A container for a blender comprising *a bottom surface* having at least five sides, and a blade assembly extending

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factual background pertinent to the present Motion and incorporates that evidence into the record of the present Motion by this reference. *See* Dkt. 29.

[3] The parties agree that the geometry of the Mini WildSide jar is, for purposes of evaluating infringement, the same as the WildSide+ jar. *See* Lueptow Depo. at 30:4-9 (Ex. 43) (testifying that the infringement analysis for the WildSide+ and the Mini WildSide "would rise and fall together."). Accordingly, Blendtec's arguments herein are equally applicable to the Mini Wildside, although for simplicity Blendtec will direct its argument of non-infringement to the WildSide+ jar.

[4] The non-infringement analysis in this Motion will focus solely on the independent claims of the '004 patent, because if Blendtec does not infringe the independent claims, it cannot infringe any dependent claims as a matter of law. *See Ferring B.V. v. Watson Laboratories, Inc.*, 764 F.3d 1401, 1411 (Fed. Cir. 2014) ("Because we hold that the asserted independent claims of Ferring's patents are not infringed, the asserted dependent claims are likewise not infringed.").

[5] Exhibit 2 includes a chart from the file history of the '004 patent identifying which application claim numbers correspond to the final claim numbers in the '004 patent.

> from the bottom surface and rotatable about a vertical axis extending through the bottom surface, wherein a first side is positioned closer to the vertical axis than is a second side.

Preliminary Amendment, June 11, 2008 at 2 (Ex. 3) (emphasis added). Claims 9, 14, 20, 24, 28, and 43 as originally presented similarly recited the bottom surface broadly, thus encompassing configurations with any degree of symmetry or no symmetry at all. *Id*. at 2-6; *see also* Ex. 2.

Claim 33 of the '004 patent was originally presented as application claim 27 and limited the bottom surface to non-symmetrical shapes.

> 27. (Original) A container for a blender comprising a bottom surface having at least five sides intersecting to form at least five comers; a plurality of side walls extending from the bottom surface, wherein *a cross-section of the bottom surface is non-symmetrical*; and a blade assembly extending from the bottom surface, wherein the blade assembly is positioned a first distance from a first comer and positioned a second distance from a first side wall.

Preliminary Amendment, June 11, 2008 at 6 (Ex. 3) (emphasis added).[6]

In August 2009, the patent examiner rejected the proposed claims on various grounds. *See* Office Action, Aug. 6, 2009 (Ex. 4). On September 17, 2009, Vita-Mix's counsel had a personal interview with the examiner to discuss possible amendments to the claims that would distinguish the invention over the cited prior art. *See* Interview Summary (Ex. 5). The examiner's interview summary indicates that Vita-Mix and the examiner concluded that amending "[a]ll independent claims" to recite additional features, including "the line of symmetry features," would "define over the cited art." *Id.*

Consistent with the interview summary, Vita-Mix then amended all independent claims on September 25, 2009 by adding the following limitations: "the bottom surface having only one line of symmetry" and "the vertical axis being located on the line of symmetry." *See* Response to Office Action, Sept. 25, 2009 at 3-11 (Ex. 6). In addition to adding the "one line of symmetry" limitation, Vita-Mix removed the "non-symmetrical" language from application claim 27 and all other dependent claims requiring a "non-symmetrical" shape. *Id.* at 9. In its arguments to the PTO, Vita-Mix explicitly relied on the "only one line of symmetry" limitations to distinguish the invention.

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[6] Similar to independent claim 27, some original dependent claims stated that the "cross-section of the side walls has a non-symmetrical shape." *See* application claims 3, 8, 12, 16, 21, 26 in Preliminary Amendment, June 11, 2008 at 2-5 (Ex. 3).

> These claims have now been amended to include a combination of features not found in or suggested by that art, or any art of record or known to the Applicants. Specifically, none of the art discloses or suggests a container having a blade assembly positioned with its vertical axis off center of the bottom surface of the container, *and having a configuration with only one line of symmetry*, the axis being on that line of symmetry. It was the understanding of the undersigned that claims directed to these features would be allowable subject to a further search. Thus, all of the independent claims now contain these features. … [N]one of the prior art, either singly or in combination, teaches a container having a blade assembly with its vertical axis off center of the bottom surface and yet on a single line of symmetry of that surface.

Id. at 14-15 (emphasis added).

In a subsequent Office Action, the examiner again rejected the claims based on various prior art references. *See* Office Action, Feb. 17, 2010 at 9-10, 15-42 (Ex. 7). Vita-Mix's counsel held a telephone interview with the examiner on April 12, 2010, after which the examiner acknowledged that a certain prior art reference did not have the "one line of symmetry" limitation as he originally thought. *See* Interview Summary, April 16, 2010 (Ex. 8). On May 24, 2010, Vita-Mix further amended the claims to specify that it is the "periphery" of the bottom surface that must have "only one line of symmetry." *See* Response to Office Action, May 24, 2010 at 4-8 (Ex. 9). Vita-Mix again explicitly cited and relied on the "only one line of symmetry" limitation to distinguish the invention over the prior art. *Id.* at 17.

Because the examiner maintained various rejections over Vita-Mix's arguments, Vita-Mix appealed to the Board of Patent Appeals. In its two appeal briefs, Vita-Mix reiterated its reliance on the "only one line of symmetry" limitation as a "novel" feature distinguishing the invention from the prior art. Appeal Brief at 17 (Ex. 11); Reply Appeal Brief at 5 (Ex. 12). The Board agreed with Vita-Mix that the "only one line of symmetry" feature was not found in the cited art, and the claims were thereafter allowed by the examiner. *See* Decision on Appeal (Ex. 13).

C. BLENDTEC'S PATENTED WILDSIDE AND WILDSIDE+ JARS

Over Memorial Day weekend in 2001, Blendtec's founder, Tom Dickson, invented a 5-sided jar, which Blendtec later patented and called the WildSide jar. *See* Trial Testimony of Tom Dickson at A13315:19-A13317:21, A13323:1-13324:14 (Dkt. 29-1); Blendtec Patents (Dkt. 29-8, Dkt. 29-9). In 2010, Vita-Mix was found liable for copying Blendtec's WildSide jar and willfully infringing Blendtec's patents, which was upheld on appeal by the Federal Circuit. *See* Dkt. 29-27; Dkt. 29-29 at A45-A46; *K-TEC, Inc. v. Vita-Mix Corp.*, 696 F.3d 1364, 1374 (Fed. Cir. 2012). In fact, Vita-Mix is permanently enjoined from making, using, selling or offering to sell a 5-sided jar configured like the Wildside jar. *See* Permanent Injunction (Dkt. 29-28). Incredibly, Vita-Mix now accuses the same Wildside jar that it copied from Blendtec of infringing the claims of its new '004 patent. Complaint (Dkt. 1).

In January 2014, months before Vita-Mix's '004 patent issued, Blendtec became aware of the pending claims of the '004 patent that require "only one line of symmetry" and began to revisit the design of the WildSide jar in an effort to both avoid the expense of an infringement dispute (regardless of the lack of merit)[7] and improve the blending performance of the jar. *See* Deposition of Thomas Dickson (Dickson Depo.) at 11:4-12:5, 61:16-62:17 (Ex. 14); Deposition

[7] Although Blendtec believes Vita-Mix's '004 patent claims are invalid and were acquired through an improper manipulation of the patent system, *see* Dkt. 28, in an abundance of caution Blendtec nevertheless chose to change the design of its jar based on the claim language Vita-Mix used in the '004 patent to avoid infringement, just as the Patent Laws encourage. *See* Galbraith Depo. at 36:21-37:25, 78:15-22 (Ex. 15); *see also Read*, 970 F.2d at 828; *Hilton Davis*, 62 F.3d at 1520.

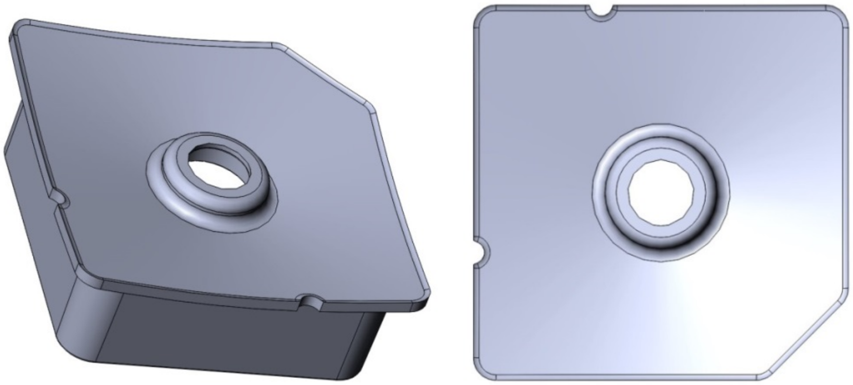
of Richard Galbraith (Galbraith Depo.) at 36:21-37:25, 78:15-22 (Ex. 15); Deposition of Shawn Elgaaen (Elgaaen Depo.) at 64:13-21, 67:22-68:19 (Ex. 16). In February 2014, Blendtec tested a variety of asymmetric redesign options that altered the interior periphery of the bottom surface of the jar in a way that removed its symmetry in order to determine which design yielded the best blending performance. *See* Testing Reports (Exs. 18-24); Elgaaen Depo. at 84:12-86:10, 88:21-90:3, 93:1-19, 96:22-97:19, 98:1-7, 99:23-100:20, 102:6-11 (Ex. 16). By March 2014, Blendtec had discontinued the WildSide jar and altered the WildSide mold core to produce a jar with no symmetry at the interior periphery of the bottom surface, which Blendtec named the WildSide+ jar. *See* Invoices for Mold Change (Exs. 25-26); Emails (Ex. 32-33); Engineering drawings (Exs. 27-28, 30); Engineering Change Orders (Exs. 29, 31, 34); Elgaaen Depo. at 51:10-52:24, 53:17-56:13, 112:2-113:7, 119:3-11, 122:16-123:11, 124:24-126:2, 126:17-24 (Ex. 16); Galbraith Depo. at 39:8-40:2, 68:18-69:6 (Ex. 15); Deposition of Christopher Georgeson (Georgeson Depo.) at 80:9-14 (Ex. 17); Dickson Depo. at 45:20-46:3 (Ex. 14). As depicted below, Blendtec permanently modified the mold core for the WildSide jar so that it included two asymmetrically placed ridges that extend down the side wall into the bottom surface, thus modifying the interior bottom surface periphery such that it no longer possessed a line of symmetry.

See Mold Core photos (Ex. 35). The modification to the mold core made it impossible for Blendtec to manufacture the original WildSide jar again. *See* Galbraith Depo. at 39:22-40:2 (Ex. 15); Elgaaen Depo. at 51:10-52:24 (Ex. 16).

In early March 2014, Blendtec began using the modified mold to manufacture WildSide+ jars. *See* Ex. 33; Galbraith Depo. at 39:8-40:2, 53:12-54:3, 70:19-23 (Ex. 15); Georgeson Depo. at 51:4-52:6 (Ex. 17). Blendtec formally introduced the WildSide+ jar to the market that same month. *See* Press Release (Ex. 36). Sales of WildSide jars through Blendtec's website ceased March 13, 2014, at which point Blendtec began selling the redesigned WildSide+ jar. *See* Internet Sales Reports (Exs. 37-38); Galbraith Depo. at 48:22-50:1, 59:20-60:4, 63:10-14 (Ex. 15); Elgaaen Depo. at 37:19-25 (Ex. 16). Blendtec had completely ceased shipping, selling or offering to sell the original WildSide jar no later than June 1, 2014, over two weeks before the '004 patent issued. *See* Exs. 39-40; Galbraith Depo. at 52:5-7, 73:18-74:20 (Ex. 15); Georgeson Depo. at 68:7-69:7, 77:15-18, 79:4-10 (Ex. 17). By June 1, 2014, Blendtec had also removed all WildSide jars from existing inventory and destroyed them. Galbraith Depo. at 40:3-20, 71:17-72:16 (Ex. 15); Georgeson Depo. at 39:20-41:6, 48:2-11 (Ex. 17); Dickson Depo. at 47:8-48:7, 49:21-50:7, 56:7-19 (Ex. 14); Elgaaen Depo. at 130:25-131:23 (Ex. 16); Recycling records (Ex. 41). Blendtec even ceased using the WildSide jar internally, removing all WildSide jars from its office-place kitchens. *See* Galbraith Depo. at 56:15-22 (Ex. 15).

Given the changes to the mold core, the interior periphery of the bottom surface of the WildSide+ jar defines a shape that does not have any lines of symmetry—it is completely asymmetrical.[8]

[8] With this Motion, Blendtec will deliver to the Court a sample of the WildSide+ jar (Ex. 48) and the Mini WildSide jar (Ex. 49) for the Court to evaluate in person.



Images from Blendtec CAD file for WildSide+ jar (Smith Decl. at ¶ 2) (Ex. 42)

Sectioned Bottom Surface of WildSide+ jar (Smith Decl. at ¶ 3) (Ex. 42)

Because of the significant improvement in blending performance achieved by the Wildside+ jar design with the two asymmetrical ridges, Blendtec applied for and was awarded a patent on the new design. *See* U.S. Patent No. 9,420,915 (Ex. 47).

III. ARGUMENT

Summary judgment is warranted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter law. In considering a motion for summary judgment, the court must draw reasonable inferences from the evidence in the light most favorable to the nonmoving party. *Babcock & Wilcox Co. v. Cormetech, Inc.*, 848 F.3d 754, 758

(6th Cir. 2016); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).[9] "Not just any alleged factual dispute between the parties will defeat an otherwise properly supported motion for summary judgment; the dispute must present a genuine issue of material fact." *Babcock*, 848 F.3d at 758. "A dispute is 'genuine' only if based on evidence upon which a reasonable jury could return a verdict in favor of the non-moving party." *Id.* "A factual dispute concerns a 'material' fact only if its resolution might affect the outcome of the suit under the governing substantive law[.]" *Ohio law. Crouch v. Honeywell Int'l, Inc.*, 720 F.3d 333, 338 (6th Cir. 2013). "A mere scintilla of evidence or some metaphysical doubt as to a material fact is insufficient to forestall summary judgment." *Babcock*, 848 F.3d at 758 (citing *Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281, 284 (6th Cir. 2015)).

Summary judgment of non-infringement is warranted in this case because: (a) Blendtec did not make, use, sell, offer to sell or import the accused WildSide jar after the '004 patent issued, (b) the WildSide+ jar does not literally have a bottom surface periphery with only one line of symmetry, and (c) Vita-Mix is not entitled to rely on the doctrine of equivalents to prove infringement as a matter of law. Each point is addressed below.

A. BLENDTEC HAS NOT INFRINGED THE '004 PATENT WITH THE WILDSIDE JAR

To prove infringement based on the original WildSide jar, Vita-Mix must prove that Blendtec made, used, sold, offered for sale, or imported the WildSide jar *after* June 17, 2014, the day the '004 patent issued. *See* 35 U.S.C. § 271(a). "Mere possession of a product which becomes covered by a subsequently issued patent does not constitute an infringement of that patent until the product is used, sold, or offered for sale in the United States during the term of

[9] The Federal Circuit applies regional circuit law to the standards governing summary judgment motions. *CollegeNet, Inc. v. ApplyYourself, Inc.*, 418 F.3d 1225, 1230 (Fed. Cir. 2005).

the patent." *Welker Bearing Co. v. PHD, Inc.*, 550 F.3d 1090, 1095 (Fed. Cir. 2008) (quoting *Johns Hopkins Univ. v. CellPro, Inc.*, 152 F.3d 1342, 1366 (Fed. Cir. 1998)).

Perhaps recognizing that it cannot prove any acts of infringement after the '004 patent issued, Vita-Mix has improperly tried to shift its burden to Blendtec on this issue. *See* Vita-Mix Response to Interrogatories at 18 (Ex. 45) ("Blendtec's failure to adduce any evidence that is has not made, used, sold, offered for sale, or imported the WildSide Jar in the United States after the Patent-in-Suit issued on June 17, 2014, supports the contention that Blendtec has not ceased such activities."). This theory of infringement fails. In *Welker*, for example, the plaintiff contended that the defendant "had an affirmative duty at the point in time the patent issued to take the product off the market and they didn't do that." 550 F.3d at 1095. However, the record contained no evidence "to show that [the defendant] continued to offer its product for sale" after the patent issued. *Id.* The Federal Circuit affirmed summary judgment of non-infringement with the following reasoning.

> Moreover, PHD did not have any burden to prove it retracted any putative offer for sale. *Rather the burden remains with the patentee to prove infringement, not on the defendant to disprove it*. In any event, this court observes that the district court properly concluded, "Defendant's flat denial, backed by evidence, of any commercial activity after September 7, 2004 stands uncontradicted by anything in the record." SJ Opinion at 708. For that reason, this court holds that the district court did not err in granting summary judgment of noninfringement of the '478 patent.

Id. (emphasis added).

Here, Blendtec has provided overwhelming and uncontroverted evidence showing that between January and June 1, 2014, Blendtec discontinued all sales of the WildSide jar, permanently modified the WildSide mold to make the new WildSide+ jar, and removed all existing WildSide jars from inventory and scrapped them. This evidence includes testimony from multiple witnesses (Exs. 14-17), contemporaneous testing documents (Exs. 18-24), engineering documents (Exs. 27-31, 34), documents proving modification of the mold (Exs. 25-26, 35), email communications (Exs. 32-33), a press release (Ex. 36), and recycling documents (Ex. 41).

The only evidence Vita-Mix has cited to support its feeble claim against the WildSide jar are screen shots of *third-party* retailer websites, some of which continued to depict the old WildSide jar after the '004 patent issued. *See* Vita-Mix Supp. Response to Interrogatory No. 12 (citing third-party website documents VM00005576-5792) (Ex. 45). However, even if these website images could prove infringement by those non-parties,[10] they do not demonstrate infringing conduct by Blendtec. *See Smith v. Garlock Equip. Co.*, 658 Fed.Appx. 1017, 1027 (Fed. Cir. 2016) (reversing jury verdict of infringement, finding that the actions of "sister companies and distributors" cannot be imputed to a defendant to find infringement); *Aristocrat Tech. Aust. PTY Lid. v. Int'l Game Tech.*, 709 F.3d 1348, 1362 (Fed. Cir. 2013) ("[F]or a party to be liable for direct patent infringement …, that party must commit all the acts necessary to infringe the patent, either personally or vicariously.") (citation omitted). Vita-Mix has no evidence that Blendtec itself engaged in any infringing actions respecting the WildSide jar after June 17, 2014. Indeed, despite Vita-Mix providing all relevant evidence on infringement to its expert witness, Dr. Richard Lueptow, he testified that he was not aware of any infringing conduct on the part of Blendtec, but had only seen third-party websites. *See* Deposition of Dr. Richard Lueptow (Lueptow Depo.) at 30:1-19 (Ex. 43).

The Court should, therefore, enter summary judgment of non-infringement with respect to the WildSide jar.

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[10] It is unlikely that the internet advertisements of these third parties would give rise to infringement liability even if Vita-Mix sued those parties. *See Smith v. Garlock Equip. Co.*, 658 Fed.Appx. 1017, 1028 (Fed. Cir. 2016) (finding advertisements that depicted infringing device did not qualify as an offer for sale, where the device actually sold was not infringing; "In general, advertisements are not considered offers for sale[.]").

B. THE WILDSIDE+ JAR DOES NOT LITERALLY INFRINGE ANY CLAIM OF THE '004 PATENT

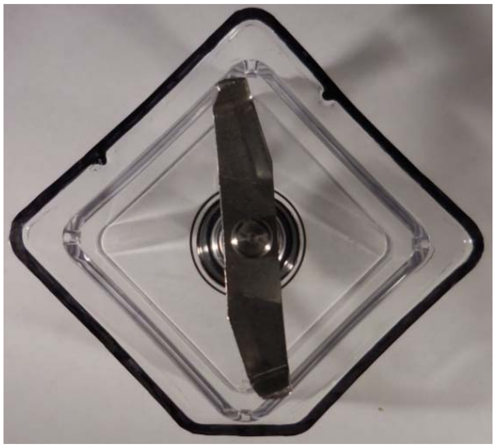
To prove literal infringement, "every limitation set forth in a claim must be found in an accused product, **exactly**[.]" *Microsoft Corp. v. Geo Tag, Inc.*, 817 F.3d 1305, 1313 (Fed. Cir. 2016) (affirming summary judgment of non-infringement; *quoting Southwall Techs., Inc. v. Cardinal IG Co.*, 54 F.3d 1570, 1575 (Fed. Cir. 1995)) (emphasis added). "If any claim limitation is absent from the accused product, there is no literal infringement as a matter of law." *Cephalon, Inc. v. Watson Pharms., Inc.*, 707 F.3d 1330, 1340 (Fed. Cir. 2013). *See also Johnston v. I.V.A.C. Corp.*, 885 F.2d 1574, 1580 (Fed. Cir. 1989) ("Unless each and every claim limitation reads *precisely* on the accused device, however, there is no literal infringement.") (emphasis added).

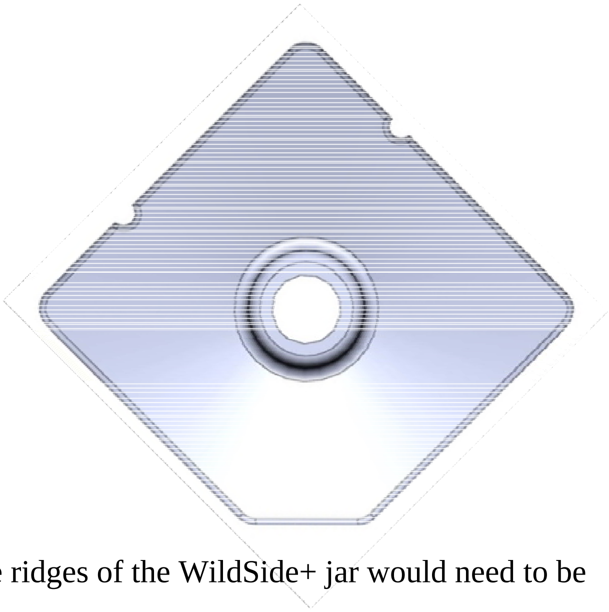
"[A] court may determine infringement on summary judgment 'when no reasonable jury could find that every limitation recited in the properly construed claim either is or is not found in the accused device.'" *EMD Millipore Corp. v. AllPure Tech., Inc.*, 768 F.3d 1196, 1201 (Fed. Cir. 2014) (affirming summary judgment of no infringement; *quoting Innovention Toys, LLC v. MGA Entmn't, Inc.*, 637 F.3d 1314, 1319 (Fed. Cir. 2011)). The issue of infringement for "simple technology" like the geometry of a blending jar is particularly amenable to resolution on summary judgment. *See K-TEC*, 696 F.3d at 1374 (affirming summary judgment of infringement based on "visual comparison" of the accused blending jar and the construed claims, despite conflicting expert witness testimony).

In this case, as Vita-Mix's expert admits, "if the bottom surface periphery of a blender jar has no lines of symmetry," the claims of the '004 patent do not cover that jar. Lueptow Depo. at 33:13-17 (Ex. 43). Dr. Lueptow also acknowledges that there is no factual dispute concerning "the physical reality" of the WildSide+ jar. *Id.* at 41:10-43:2. Where there is no dispute about the structure of the accused device, the infringement analysis collapses to a question of law based on the meaning of the claims as interpreted by the Court. *See, e.g., CCS Fitness, Inc. v. Brunswick Corp.*, 288 F.3d 1359, 1365 (Fed. Cir. 2002) ("[T]he litigants frequently do not dispute the structure of the accused device, meaning the infringement analysis often turns on the interpretation of the claims alone.").

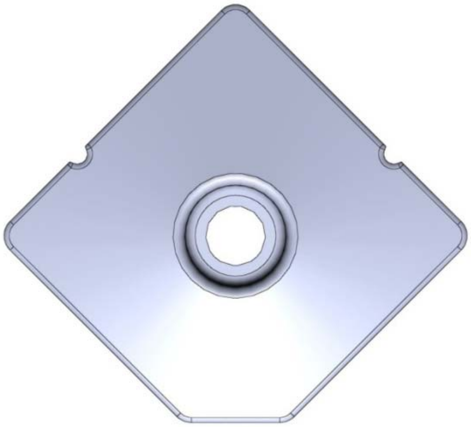
The undisputed interior periphery[11] of the bottom surface of the WildSide+ jar does not have a literal line of symmetry. Vita-Mix has explained that the plain meaning of a line of symmetry "is the line (l) that divides a plane figure into mirror images on either side of the line, and a figure with a line of symmetry is 'said to have bilateral symmetry or to be symmetrical by reflection in the line l.'" Vita-Mix Opposition at 18 (Dkt. 31) (*citing* A Concise Dictionary of Mathematics). Blendtec agrees with this common meaning. Accordingly, there can be no literal infringement by the WildSide+ jar, because one cannot draw a line anywhere on the bottom surface periphery and create mirror images.

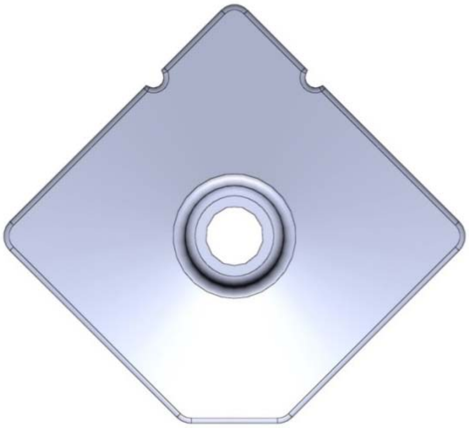
[11] It is not disputed that the plain meaning of "interior periphery" is the outer edge of the interior bottom surface—*i.e.*, where the side walls extend from the bottom surface. Vita-Mix's claim construction disclosure provided dictionary definitions setting forth the common meaning of "periphery" as being a "precise boundary" that is the "outer edge of a particular area." *See* Exhibit 46, p. 5. Dr. Lueptow also agreed that the periphery of the Wildside+ jar can be found at the "outermost edge of the bottom" which includes the ribs. Lueptow Depo at 85:22-86:13 (Ex. 43). And Blendtec's proposed construction of interior periphery, "defined by the intersection of the upper surface of the bottom wall and the interior surface of the side walls," was not rejected by the Court as incorrect, but merely found to be "redundant" and "already encompassed by simply noting that 'periphery' refers to the 'interior' bottom surface." Claim Const. Order at 11 (Dkt. 45); Vita-Mix Brief at 10 (Dkt. 39) (arguing that Blendtec's construction merely "restates" the plain meaning with unnecessarily complex language). This is also consistent with Vita-Mix's explanations of the bottom surface periphery to the Patent Office examiner. *See, e.g.,* Response to Office Action, Nov. 17, 2010 at 10 (Ex. 10) ("Thus, in accordance with the application, the perimeter of the bottom surface is defined by its 'sides,' and the 'side walls' extend upwardly from those 'sides' on the perimeter of the bottom surface."). *See also* Appeal Brief at 13-16 (Ex. 11); Reply Appeal Brief at 5-7 (Ex. 12).





In order to have a line of symmetry, the ridges of the WildSide+ jar would need to be placed in a way that created mirror-image halves about a line running through the center, such as those illustrated below.





Placing the two ridges in a manner specifically to avoid a line of symmetry in the bottom surface was one of the intended results of the WildSide+ design. Blendtec engineer, Shawn Elgaaen, testified that the purpose behind the design of the WildSide+ jar was, in part, "to avoid or remove any symmetry or any opportunity that … a line could be drawn through any section of the bottom surface and derived two halves that would be symmetrical or mirror images about – about that line." Elgaaen Depo. at 64:8-21 (Ex. 16).

Even Dr. Lueptow admitted that the ridges in the WildSide+ jar make a "measureable" difference in the geometry of the bottom surface periphery and result in what he calls a "slight deviation" from symmetry. *See* Lueptow Depo. at 108:11-14, 114:1-120, 130:23-131:20 (Ex. 43).[12] Thus, granting Vita-Mix every reasonable inference, the undisputed lack of literal symmetry in the WildSide+ jar (whether slight or not) compels summary judgment of no literal infringement. *See Lantech, Inc. v. Keip Mach, Co.*, 32 F.3d 542, 547 (Fed. Cir. 1994) ("For literal infringement, each limitation of the claim must be met by the accused device *exactly, any deviation* from the claim precluding a finding of infringement.") (emphasis added); *Key Mfg. Group, Inc. v. Microdot, Inc.*, 854 F.2d 1328 (Fed. Cir. 1988) ("The district court erred because it ignored claim limitations by labeling them as insignificant. All claim limitations are significant and must be considered."); *Merck & Co., Inc. v. Mylan Pharm., Inc.*, 190 F.3d 1335, 1338 (Fed. Cir. 1999) ("No charge of literal infringement was made, for Mylan's polymer vehicle is not identical to that of the claims.").

In the face of the undisputed facts regarding the two ridges that destroy any symmetry in the Wildside+ jar, Vita-Mix's (and Dr. Lueptow's) position concerning literal infringement is based on a newly-conceived *claim construction* dispute that attempts to re-write the claim language. Specifically, Dr. Lueptow opines that the "only one line of symmetry" limitation should be modified to include the qualifiers "approximate" or "about," and does not require exact symmetry. *See* Lueptow Depo. at 40:14-17 (Ex. 43). For their infringement analysis, Dr. Lueptow and Vita-Mix use one of the preferred embodiments from the '004 patent, Figure 6, as a litmus test to determine whether any protrusions from the side wall into the interior bottom surface periphery create a sufficient deviation from symmetry to avoid the "only one line of symmetry" limitation. *Id*. at 44:3-9, 52:7-17, 61:18-62:11, 73:18-74:4. This approach is legally improper for several reasons.

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[12] Dr. Lueptow tried to disregard the ridges as "small imperfections," but was forced to acknowledge that they were not manufacturing imperfections and that they were a deliberate part of the design of the WildSide+ jar. *See* Lueptow Depo. at 107:2-15. That Dr. Lueptow views the WildSide+ jar's deviation from symmetry to be "slight" does not impact the literal infringement analysis; it merely raises a potential doctrine of equivalents inquiry, if that doctrine were available to Vita-Mix. *See Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.*, 535 U.S. 722, 733 (2002) ("The doctrine of equivalents allows the patentee to claim those insubstantial alterations that were not captured in drafting the original patent claim[.]");*Carroll Touch, Inc. v. Electro Mechanical Systems, Inc.*, 15 F.3d 1573, 1579 (Fed. Cir. 1993) ("[I]nfringement cannot be established unless every limitation of a claim is satisfied either exactly ***or*** by an equivalent in the accused device.") (emphasis added).

First, neither party asked the Court to construe "only one line of symmetry" beyond the plain meaning of the terms. The plain language—"only one line of symmetry"—is not ambiguous and, even according to Vita-Mix, requires a "mirror-image" line of reflection—*i.e.*, precise symmetry. Vita-Mix Opposition at 18 (Dkt. 31). Vita-Mix never proposed a special construction that would redefine "only one line of symmetry" to encompass "approximate" symmetry or to incorporate one of the preferred embodiments from the '004 patent in deciding whether deviations in the jar should "count" in the symmetry determination. *See* Dkt. 44.[13] It would be legal error to allow Vita-Mix's expert to proffer and rely on his own claim construction for "only one line of symmetry" in order to argue to the jury that the two asymmetrical ridges in the Wildside+ jar do not "count." *See O2 Micro Int'l Ltd. v. Beyond Innovation Tech., Ltd.*, 521 F.3d 1351, 1362 (Fed. Cir. 2008) (finding legal error where district court permitted expert witness to argue the meaning of a claim term the parties did not present for construction; "the meaning and legal significance of the 'only if' limitation were improperly submitted to the jury"); *Cordis Corp. v. Bos. Scientific Corp*., 561 F.3d 1319, 1337 (Fed. Cir. 2009) ("[I]t is improper to argue claim construction to the jury ....").

Second, in amending the patent claims, Vita-Mix could have, but chose not to, use terms of approximation when describing the "only one line of symmetry" requirement. The claims do

[13] In the event Vita-Mix, in opposing the present Motion or in its own motion, blind-sides Blendtec with a request for the Court to construe "only one line of symmetry," the Court should reject such an invitation as untimely under the Court's Local Patent Rules and unduly prejudicial to Blendtec. *See O2 Micro Int'l Ltd. v. Monolithic Power Sys., Inc.*, 467 F.3d 1355 (Fed. Cir. 2006) (affirming district court denial of leave to amend patent infringement contentions as untimely under the local patent rules); *Stairmaster Sports/Medical Prods., Inc. v. Groupe Procycle, Inc.*, 25 F.Supp.2d 270, 279 (D. Del. 1998) (precluding untimely claim construction argument raised for the first time in summary judgment briefing; "Stairmaster's arguments are too late."). Vita-Mix has already conceded that the phrase "only one line of symmetry" carries its plain and ordinary meaning. Vita-Mix Opposition at 18 (Dkt. 31).

not qualify the single line of symmetry with terms like "about" or "substantially" or "approximately," despite such modifiers being commonplace in patent claim drafting. *See, e.g.*, *In re Hauserman, Inc.*, 892 F.2d 1049 (Fed. Cir. 1989) ("Words such as "substantially", "approximately", and "about" are often used in claims to prevent a potential infringer from avoiding literal infringement simply by making a minor modification."). Vita-Mix's attorneys were well aware of such modifiers, as they had used them in drafting other claim limitations in other patents covering Brent Miller's inventions. *See, e.g.*, '478 patent at claim 1 (Ex. 44) (claiming "substantially flat" and "generally curved" walls). Because Vita-Mix chose an exact geometric relationship to define the periphery of the bottom surface, the literal scope of the claims cannot extend beyond a literal line of symmetry. *See Talbert Fuels Sys. Patents Co. v. Unocal Corp.*, 347 F.3d 1355, 1360 (Fed. Cir. 2003) ("Talbert argues that the claims contain an unnecessarily exact boiling limit; if so, the court is without power to make such a correction."); *PSC Computer Prods., Inc. v. Foxconn Intern., Inc.*, 355 F.3d 1353, 1357 (Fed. Cir. 2004) ("Courts can neither broaden nor narrow the claims to give the patentee something different than what he has set forth." internal citation omitted); *K–2 Corp. v. Salomon S.A.*, 191 F.3d 1356, 1364 (Fed. Cir. 1999) ("Courts do not rewrite claims; instead, we give effect to the terms chosen by the patentee.").

Finally, Vita-Mix's method of determining infringement by comparing the accused product to a figure in the specification, Figure 6, is legal error. "Infringement, either literally or under the doctrine of equivalents, does not compare the accused product 'with a preferred embodiment described in the specification[.]'" *Schreiber Foods, Inc. v. Beatrice Cheese, Inc.*, 31 Fed.Appx. 727, 731-32 (Fed. Cir. 2002) (quoting *SRI Int'l v. Matsushita Elec. Corp.*, 775 F.2d 1107, 1121 (Fed. Cir. 1985)); *see also Catalina Lighting, Inc. v. Lamps Plus, Inc.*, 295 F.3d 1277, 1286 (Fed. Cir. 2002) ("[I]nfringement is to be determined by comparing the asserted claim to the accused device, not by comparing the accused device to the figures of the asserted patent."); *CCS Fitness*, 288 F.3d at 1370 (finding the district court erred by comparing the accused product to preferred embodiments during infringement analysis).

In *Not Dead Yet Manufacturing, Inc. v. Pride Solutions, LLC*, the defendant's expert compared the accused products with the characteristics of the invention shown in "Fig. 6 of the '432 Patent" to argue non-infringement. 2016 WL 6948373 at *4, __F.Supp.3d__ (N.D. Ill. November 28, 2016). The district court excluded the expert's opinions "because they [were] based on a comparison of the accused products to a preferred embodiment of the patent." *Id*. For the same reason, district courts across the country, including this Court, consistently exclude opinions such as Dr. Lueptow's as improper. *See* Lueptow Depo. at 41:2-9, 44:3-9 (Ex. 43) (testifying that "any deviation from perfect symmetry that was less than the deviation in Figure 6 of the provisional [application] shouldn't be counted in determining whether a blender jar bottom surface periphery has a single line of symmetry[.]"); *Tap Pharm. Prods., Inc. v. Owl Pharm. LLC*, 2002 WL 34381130 at *5 (N.D. Ohio Sept. 16, 2002) (excluding expert opinion; "[A]ny comparison between Plaintiff's commercial product or the patent examples and [the accused product]…would be improper.").[14]

What matters for *literal* infringement is the *literal* language of the claims as construed by the Court. *See Stairmaster*, 25 F.Supp.2d at 285 ("To read a claim literally is the rule, not the exception."). It is undisputed that the interior periphery of the bottom surfaces of the WildSide+

[14] *See also EMC Corporation v. Pure Storage, Inc*., 2016 WL 775742 at *4 (D. Del. February 25, 2016) (excluding expert opinion; "Testimony that embodiments in a patent specification support an expert's opinions regarding the plain and ordinary meaning of claim terms would amount to claim construction and suggest that literal infringement can be established by a comparison between accused products and specification embodiments."); *MediaTek Inc. v. Freescale Semiconductor, Inc*., 2014 WL 971765, at *4 (N.D. Cal. Mar. 5, 2014) (excluding expert testimony that "relie[d] heavily on the prosecution history, specifications, and even provisional applications to explain and expound upon a specific meaning and/or requirements of the terms identified."); *Dataquill Ltd. v. Huawei Tech. Co. Ltd*., 2015 WL 9450821 at *2 (E.D. Tex. June 11, 2015) (excluding expert opinion; "Dr. Konchitsky is not permitted to confuse or mislead the jury by rendering comparisons of particular embodiments (such as, exemplary figures) to the accused products throughout his non-infringement analysis.").

jar and the Mini WildSide jar do not literally have a line of symmetry. Accordingly, the Court should enter summary judgment of no literal infringement.

C. VITA-MIX IS BARRED FROM ASSERTING INFRINGEMENT UNDER THE DOCTRINE OF EQUIVALENTS

In the absence of literal infringement, sometimes "a patentee may establish infringement under the doctrine of equivalents if an element of the accused device 'performs substantially the same function in substantially the same way to obtain the same result as the claim limitation.'" *EMD*, 768 F.3d at 1202 (*quoting AquaTex Indus., Inc. v. Techniche Solutions*, 419 F.3d 1374, 1382 (Fed. Cir. 2005)). However, "the doctrine of equivalents necessarily adds uncertainty to the scope of patent claims, and thereby detracts from the public-notice function of patent claims and risks deterring non-infringing and potentially innovative endeavors." *Freedman Seating Co. v. Am. Seating Co.*, 420 F.3d 1350, 1358 (Fed. Cir. 2005). *See also Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 727 (2002) ("If the range of equivalents is unclear, competitors may be unable to determine what is a permitted alternative to a patented invention and what is an infringing equivalent."); *Warner-Jenkinson*, 520 U.S. at 29 ("There can be no denying that the doctrine of equivalents, when applied broadly, conflicts with the definitional and public-notice functions of the statutory claiming requirements."). Accordingly, "to strike the proper balance between protecting patentees while also providing sufficient notice to the public, various rules of law have emerged to constrain when and how the doctrine of equivalents is to be applied." *Freedman Seating*, 420 F.3d at 1358.

In this case, there are three independent legal grounds that bar Vita-Mix from invoking the DOE: (a) prosecution history estoppel, (b) claim vitiation, and (c) the disclosure-dedication rule. Each is addressed in turn.

1. **Prosecution History Estoppel Bars Application Of The Doctrine Of Equivalents To The "Only One Line Of Symmetry" Limitation**

"Prosecution history estoppel prevents a patentee from recapturing through the doctrine of equivalents the subject matter that the applicant surrendered during prosecution. … It presumptively applies when the applicant made a narrowing claim amendment related to patentability." *Integrated Tech. Corp. v. Rudolph Tech., Inc.*, 734 F.3d 1352, 1356 (Fed. Cir. 2013) (reversing judgment of infringement under the DOE after a jury trial based on prosecution history estoppel) (citing *Festo*, 535 U.S. at 734, 736-37); *see also Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 344 F.3d 1359, 1366-67 (Fed. Cir. 2003) (*en banc*). "The patentee bears the burden of rebutting the application of prosecution history estoppel by establishing one of three exceptions: (1) the equivalent was unforeseeable at the time of the application; (2) the rationale underlying the amendment bears no more than a tangential relation to the equivalent in question; or (3) there is some other reason suggesting that the patentee could not reasonably be expected to have described the equivalent." *Id*. (*citing Festo.*, 535 U.S. at 734). "Whether prosecution history estoppel applies, and thus whether the doctrine of equivalents is available for a particular claim limitation, is a question of law[.]" *Spectrum Pharm., Inc. v. Sandoz, Inc.*, 802 F.3d 1326, 1337 (Fed. Cir. 2015) (affirming summary judgment of non-infringement and estoppel) (citing *Intervet Inc. v. Merial Ltd.*, 617 F.3d 1282, 1290–91 (Fed. Cir. 2010)). When prosecution history estoppel applies, it is "unnecessary for the district court to even undertake a doctrine of equivalents analysis" because the "issue is moot." *Id*. at 1202, n. 2.

In this case, as shown in the following chart[15], Vita-Mix narrowed the scope of the "bottom surface" limitation to overcome prior art rejections. *See* Section II.B *supra*; Exs. 2, 6, 9.

Claim 1 (application claim 1)	Claim 33 (application claim 27)
1. (Amended) A container for a blender comprising a bottom surface ~~having~~ that is at least partially sloped, the bottom surface having a periphery defining only one line of symmetry and at least five sides on the periphery of the bottom surface, and a single blade assembly extending from the bottom surface and rotatable about a vertical axis ~~extending through the bottom surface, wherein a first side is positioned closer to the vertical axis than is a second side~~ at the center of the blade assembly, the vertical axis being located on the line of symmetry and not centered relative to the bottom surface.	27. (Amended) A container for a blender comprising a bottom surface ~~having at least five sides intersecting to form at least five comers; a plurality of side walls extending from the bottom surface, wherein a cross-section of the bottom surface is non-symmetrical; and a~~ that is at least a partially sloped, the bottom surface having a periphery defining only one line of symmetry and at least five sides, a single blade assembly extending from the bottom surface~~, wherein the blade assembly is positioned a first distance from a first comer and positioned a second distance from a first side wall~~ and rotatable about a vertical axis at the center of the blade assembly, the vertical axis being located on the line of symmetry and not centered relative to the bottom surface; and a plurality of side walls extending from the bottom surface.

Vita-Mix's original claims either placed no "symmetry" limitation on the bottom surface, or required the bottom surface to be "non-symmetrical," both of which would have literally encompassed the asymmetrical configuration of the bottom surface in the WildSide+ jar. But by amending the claims to limit the bottom surface periphery to having "only one line of symmetry," Vita-Mix surrendered all configurations with more or less than one line of symmetry and cannot recapture that territory through the DOE. *See Festo*, 535 U.S. at 741 ("When the patentee has chosen to narrow a claim, court may presume the amended text was composed with awareness of this rule and that the territory surrendered is not an equivalent of the territory claimed.").

[15] Underlined text reflects additions to the claims and ~~strikethrough~~ text reflects deleted language. The same amendments were made to all independent claims in the '004 patent. Exhibit 2 contains a more detailed amendment chart showing the amendment history of all independent claims in the '004 patent.

Vita-Mix could have appealed the examiner's rejections to the Board, but instead chose to amend the claims to narrow their scope. *See* Exhibits 6-9. This decision "to forego an appeal and submit an amended claim is taken as a concession that the invention as patented does not reach as far as the original claim." *Festo*, 535 U.S. at 734. "Were it otherwise, the inventor might avoid the PTO's gatekeeping role and seek to recapture in an infringement action the very subject matter surrendered as a condition of receiving the patent." *Id*. Thus, prosecution history estoppel presumptively bars Vita-Mix from relying on the DOE.

To rebut the presumption, Vita-Mix "must show that at the time of the amendment one skilled in the art could not reasonably be expected to have drafted a claim that would have literally encompassed the alleged equivalents." *Festo*, 535 U.S. at 741. The prosecution history[16] of the '004 patent does not support any of the three narrow exceptions to prosecution history estoppel in this case.

i. The Alleged Equivalent Was Foreseeable

"The patentee may rebut the application of prosecution history estoppel by establishing that the equivalent would have been objectively unforeseeable to one of ordinary skill in the art at the time of the amendment." *Integrated Tech.*, 734 F.3d at 1359. Vita-Mix cannot possibly rebut the presumption on foreseeability grounds. The '004 patent expressly discloses "non-symmetrical" bottom surfaces as one alternative. *See* '004 patent at col. 3, lines 53-57 ("That is, irrespective of the shape of the surface 16, be it circular, square, rectangular, or a non-symmetrical shape"); col. 4, lines 16-19 ("[I]n the preferred embodiment, the shape of bottom surface 16 is non-symmetrical or otherwise irregular.") (Ex. 1). In addition, Vita-Mix originally drafted claims that would have literally encompassed the asymmetrical configuration of the

[16] *See Festo*, 344 F.3d at 1367 ("[A] patentee's rebuttal of the [prosecution history estoppel] presumption is restricted to the evidence in the prosecution history record.").

WildSide+ jar, as shown in the foregoing chart. *See* Exhibit 2. Because Vita-Mix "originally claimed the subject matter alleged to infringe but then narrowed the claim in response to a rejection, [Vita-Mix] may not argue that the surrendered territory comprised unforeseen subject matter." *Festo*, 535 U.S. at 733–34.

ii. The Amendment Was Not Merely Tangential To The Alleged Equivalent

"The tangential relation exception is 'very narrow.'" *Integrated Tech.*, 734 F.3d at 1358 (quoting *Cross Med. Prods., Inc. v. Medtronic Sofamor Danek, Inc.*, 480 F.3d 1335, 1342 (Fed. Cir. 2007)). The law "requires a strong showing—not present on this record—to satisfy the 'very narrow' exception to prosecution history estoppel for amendments only tangentially related to the equivalent in question." *Energy Transp. Group, Inc. v. William Demant Holding A/S*, 697 F.3d 1342, 1359 (Fed. Cir. 2012).

During the 15 years since the Supreme Court articulated the "tangential" exception to prosecution history estoppel, the Federal Circuit has only applied that exception in a handful of cases where the accused equivalent concerned an aspect of the invention that was not at issue during prosecution of the claims.[17] The tangential exception clearly does not apply here. The presence or absence of symmetry in the bottom surface of the blending jar was squarely at issue during prosecution and was the reason for Vita-Mix limiting the claims to "only one line of symmetry." Vita-Mix left no ambiguity as to the reason for adding the "only one line of symmetry" limitation. *See* Response to Office Action, Sept. 25, 2009, at 15 (Ex. 6) ("none of the art discloses or suggests a container … having a configuration with only one line of symmetry, the axis being on that line of symmetry."). "The public is entitled to rely on [Vita-Mix's] representations." *Integrated Tech.*, 734 F.3d at 1359. Indeed, Blendtec did so in redesigning the jar to remove its symmetry. Therefore, it cannot be said that this amendment was merely tangential to the claimed equivalent—*i.e.*, a bottom surface periphery having no lines of symmetry. *See, e.g.*, *Felix v. American Honda Motor Co.*, 562 F.3d 1167, 1184 (Fed. Cir. 2009) ("If Felix had intended *only* to add a channel and not add a gasket, he could easily have simply amended original claim 1 to add limitation (e) and not limitation (f).").

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[17] *See Insituform Technologies, Inc. v. CAT Contracting, Inc.*, 285 F.3d 1360, 1369 (Fed. Cir. 2004) (finding the reason for the claim amendment focused on limiting the *location* of a vacuum source, not the *number* of cups used to create the vacuum, and was merely tangential to the question of whether multiple vacuum cups are equivalent to a single cup); *Funai Electric Co., Ltd. v. Daewoo Electronics Corp.*, 616 F.3d 1357, 1369 (Fed. Cir. 2010) (holding a claim amendment requiring the use of an "insulating material" was tangentially related to the accused equivalent—a material that was only 92% insulating—because "the nature of the insulating material or its conductivity" was not at issue during prosecution of the claims.); *Regents of Univ. of Cal. v. Dakocytomation Cal., Inc.*, 517 F.3d 1364, 1377-78 (Fed. Cir. 2008) (finding amendments limiting the claims to a process of "blocking the labeled repetitive nucleic acids" were made to overcome prior art that did not use a blocking method and were only tangentially related to the alleged equivalent—a particular type of nucleic acid); *Primos, Inc. v. Hunter's Specialties, Inc.*, 451 F.3d 841, 849 (Fed. Cir. 2006) (holding the amendment requiring a "plate" to be "differentially spaced" above a membrane focused only on the *location* of the plate, and were therefore tangential to the inquiry of whether a "dome" could be the equivalent of a "plate."); *Intervet, Inc. v. Merial Ltd.*, 617 F.3d 1282, 1285, 1292 (Fed. Cir. 2010) (finding an amendment limiting the claims to the PCV-2 type vaccine was tangential to whether the accused vaccine was an equivalent, because the accused vaccine could potentially be "characterized as PCV-2" given their close homology to the submitted PCV-2 samples.).

It does not matter whether the prior art cited by the examiner actually had the alleged equivalent—a bottom surface with no lines of symmetry. The Federal Circuit has explained that although "an amendment made to avoid prior art that contains the equivalent in question is not tangential, … [i]t does not follow … that equivalents not within the prior art must be tangential to the amendment." *Chimie v. PPG Indus., Inc.*, 402 F.3d 1371, 1383 (Fed. Cir. 2005). It is also not relevant whether the amendment was actually the reason for overcoming the prior art. *Felix*, 562 F.3d at 1182-83 ("The fact that the first amendment did not succeed and that a further amendment was required to place the claim in allowable form, however, is of no consequence as to the estoppel."). In other words, it doesn't matter whether the "only one line of symmetry" limitations were truly necessary to overcome the examiner's rejections and gain allowance of the claims. "Prosecution history estoppel bars application of the doctrine of equivalents even where the applicant surrendered more claim scope than was necessary to overcome a rejection."

Energy Transp., 697 F.3d at 1360.[18] Given the amendment history of the claims, the law will not permit Vita-Mix to recapture bottom surface shapes with more or less than one line of symmetry.

iii. There Is No Reason Vita-Mix Could Not Have Described The Equivalent In Question

The law is clear that where the original claim language encompassed the accused equivalent, as is the case here, an effort to rebut the prosecution history estoppel presumption "cannot succeed." *Festo*, 344 F.3d at 1373. "[I]t cannot be said that there was a linguistic or 'other' limitation preventing [Vita-Mix] from describing the equivalent in question, especially where, as here, the difference between the claimed limitation and the accused equivalent is principally a difference in quantity,"—*i.e.*, one line of symmetry versus no lines of symmetry. *Id.* Because Vita-Mix cannot rebut the presumption of prosecution history estoppel, Vita-Mix is barred from invoking the DOE to prove infringement by the WildSide+ jar as a matter of law.

2. Vita-Mix's Doctrine Of Equivalents Theory Would Improperly Vitiate The "Only One Line Of Symmetry" Limitation

Apart from prosecution history estoppel, the doctrine of equivalents also is not available when the proposed equivalent would vitiate or nullify an express claim limitation. In other words, "an element of an accused product or process is not, as a matter of law, equivalent to a limitation of the claimed invention if such a finding would entirely vitiate the limitation." *Freedman Seating*, 420 F.3d at 1358 (*citing Warner-Jenkinson*, 520 U.S. at 29 ("It is important to ensure that the application of the doctrine [of equivalents] … is not allowed such broad play as

[18] *See also Norian Corp. v. Stryker Corp.*, 432 F.3d 1356, 1361–62 (Fed. Cir. 2005) (holding patentees are restricted by prosecution history estoppel to "the scope of what they ultimately claim"); *Integrated Tech.*, 734 F.3d at 1358 ("It may be that ITC did not need to surrender a lack of physical contact between the probe tip and window in either state to overcome Sato. The dispositive fact is that ITC chose to do so."); *Felix*, 562 F.3d at 1184 ("It is immaterial that Felix chose to add both the channel and the gasket limitations, rather than just one. The resulting estoppel attaches to each added limitation."); *Lucent Techs., Inc. v. Gateway, Inc.*, 525 F.3d 1200, 1218 (Fed. Cir. 2008) ("It is not relevant to the determination of the scope of the surrender that the applicant did not need to amend the claims [as they were amended] in order to overcome the prior art."); *Regents*, 517 F.3d at 1381 ("[I]t frequently happens that patentees surrender more through amendment than may have been absolutely necessary to avoid particular prior art. In such cases, we have held the patentees to the scope of what they ultimately claim[.]") (quoting *Norian*, 432 F.3d at 1361–62).

to effectively eliminate that element in its entirety.”)); *see also Lockheed Martin Corp. v. Space Sys./Loral, Inc.*, 324 F.3d 1308, 1321 (Fed. Cir. 2003) (“[I]f a court determines that a finding of infringement under the doctrine of equivalents ‘would entirely vitiate a particular claim[ed] element,’ then the court should rule that there is no infringement under the doctrine of equivalents.”(citation omitted)). In determining whether application of the DOE would entirely vitiate a claim limitation, the Court may consider “the simplicity of the structure, the specificity and narrowness of the claim, and the foreseeability of variations at the time of filing the claim with the [Patent Office].” *Freedman Seating*, 420 F.3d at 1360. *See also Holmes Group, Inc. v. RPS Prods., Inc.*, 424 F.Supp.2d 271, 288 (D. Mass. 2006) (“Here, the filter assembly’s hanging means is simple, and the language of the claim is quite narrow. The range of equivalents, if any, is therefore very small.”).

Here, as admitted by Vita-Mix’s expert, the technology at issue is very simple. *See* Lueptow Depo. at 33:18-34:19 (Ex. 43); *see also K-TEC*, 696 F.3d at 1374 (finding blending jars to be “simple technology.”).[19] In addition, the claim limitation in dispute is very specific and narrow—“only one line of symmetry.” And the possibility of a blending jar lacking symmetry was not unforeseeable to Vita-Mix at the time it submitted the asserted claims to the Patent Office. This is not a case where the “subtlety of language or complexity of the technology” justify application of the DOE in derogation of the public notice given with Vita-Mix’s chosen claim language. *See Sage Products, Inc. v. Devon Indus., Inc.*, 126 F.3d 1420, 1425 (Fed. Cir.

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[19] Dr. Lueptow testified that he had no experience in the blending design industry and does not offer any technical expertise to the literal infringement analysis beyond his view of the meaning of the claim terms, again indicating the question of literal infringement truly is a pure question of law for the Court to decide. Lueptow Depo. at 6:21-23, 9:24-10:1, 29:17-30:25; *K-TEC*, 696 F.3d at 1374 (“In the summary judgment context,’[a] party does not manufacture more than a merely colorable dispute simply by submitting an expert declaration asserting that something is black” when no reasonable juror reviewing the evidence could reach such a conclusion.”) (*quoting Invitrogen Corp. v. Clontech Labs., Inc.*, 429 F.3d 1052, 1080 (Fed. Cir. 2005)).

1997). The Federal Circuit's reasoning in *Sage Products* applies perfectly to Vita-Mix's infringement claims.

> If [Vita-Mix] desired broad patent protection for any container that performed a function similar to its claimed container, it could have sought claims with fewer structural encumbrances. Had [Vita-Mix] done so, then the Patent and Trademark Office (PTO) could have fulfilled its statutory role in helping to ensure that exclusive rights issue only to those who have, in fact, contributed something new, useful, and unobvious. Instead, [Vita-Mix] left the PTO with manifestly limited claims that it now seeks to expand through the doctrine of equivalents. However, as between [Vita-Mix] who had a clear opportunity to negotiate broader claims but did not do so, and [Blendtec], it is [Vita-Mix] who must bear the cost of its failure to seek protection for this foreseeable alteration of its claimed structure. …

Id. (affirming summary judgment of no infringement). Saying that the invention requires "*only one* line of symmetry" expressly excludes products with no lines of symmetry as well as products with more than one line of symmetry. Therefore, as a matter of law, the bottom surface of the Wildside+ jar that has *no* lines of symmetry cannot be considered equivalent to a bottom surface having *only one* line of symmetry. *See Dolly, Inc. v. Spalding & Evenflo Cos.*, 16 F.3d 394, 400 (Fed. Cir. 1994) ("[T]he concept of equivalency cannot embrace a structure that is specifically excluded from the scope of the claims.").[20]

When a patentee uses precise and narrow claim limitations as Vita-Mix has done, without any qualifiers or exceptions written into the claim element itself, infringement is properly limited to the literal scope of the limitation. In *Advanced Steel Recovery, LLC v. X-Body Equipment,*

[20] Vita-Mix's DOE theory fails for the additional reason that it seeks to equate configurations that are essentially opposites (nonsymmetrical v. symmetrical). *See, e.g., Moore U.S.A., Inc. v. Standard Register Co.*, 229 F.3d 1091, 1106 (Fed. Cir. 2000) ("[I]t would defy logic to conclude that a minority—the very antithesis of a majority—could be insubstantially different from a claim limitation requiring a majority, and no reasonable juror could find otherwise."); *Bicon, Inc. v. The Straumann Co.*, 441 F.3d 945, 955-56 (Fed. Cir. 2006) (finding the accused product's "concave" shape was "clearly contrary to, and thus excluded by, the patentee's characterization of its abutment as having a convex, frusto-spherical shape."); *Sage Products*, 126 F.3d at 1424-25 (finding a feature located below the top of the container cannot be equivalent to a claim limitation requiring the feature to be "at the top of the container body."; "[T]he doctrine of equivalents does not grant Sage license to remove entirely the 'tops of the container' and 'over said slot' limitations from the claim.").

Inc., for example, the Federal Circuit affirmed summary judgment of non-infringement under the DOE, finding that the doctrine could not expand the term "proximate end" in the claims to encompass a location that was "35% away from the extreme proximate end" of the accused device. 808 F.3d 1313, 1320-21 (Fed. Cir. 2015). The court reasoned that "[t]o find otherwise would ignore the precise and specific structural limitations in the claims." *Id.* Similarly, Vita-Mix used precise and narrow structural language to describe the bottom surface periphery as having "only one line of symmetry." Allowing such a claim to encompass a bottom surface periphery with no lines of symmetry would improperly divorce the range of equivalents from the stated scope of the claims and render the limitation meaningless. *Id*. (citing *Vehicular Techs. Corp. v. Titan Wheel Int'l, Inc.*, 212 F.3d 1377, 1382 (Fed. Cir. 2000) ("[T]he range of equivalents cannot be divorced from the scope of the claims.")). Because Vita-Mix's DOE theory would eviscerate the "one line of symmetry" limitation completely, the Court should enter summary judgment precluding application of the DOE as a matter of law.

3. **The Disclosure-Dedication Rule Precludes Vita-Mix's Reliance On The Doctrine Of Equivalents**

Finally, the disclosure-dedication rule independently precludes reliance on the DOE for the "only one line of symmetry" limitation. "[W]hen a patent drafter discloses but declines to claim subject matter, … this action dedicates that unclaimed subject matter to the public." *Johnson & Johnston Associates, Inc. v. R.E. Service Co., Inc.*, 285 F.3d 1046, 1054 (Fed. Cir. 2002). Applying the DOE "to recapture subject matter deliberately left unclaimed would 'conflict with the primacy of the claims in defining the scope of the patentee's exclusive right.'" *Id*. (quoting *Sage Products*, 136 F.3d at 1424). Thus, "[t]he disclosure-dedication doctrine bars a patentee from using the doctrine of equivalents to recapture claim scope that it disclosed in the specification but did not literally include in the patent's claims." *CSP Technologies, Inc. v. Sud-Chemie AG*, 2016 WL 1118549, __ Fed. Appx. __, at *5 (Fed. Cir. March 22, 2016).

The '004 patent explains that the invention can be practiced using an off-center blade with a bottom surface of *any shape*, including shapes with multiple lines of symmetry or no symmetry at all (*i.e.*, "non-symmetrical"). '004 patent at col. 3, lines 47-57 (That is, *irrespective of the shape of surface* 16, be it circular, square, rectangular, *or a non-symmetrical shape* such as shown in FIGS. 3, 4 and 6, the axis of rotation of blades 21, as defined by shaft 22, is not positioned on the centroid of the bottom surface 16.") (Ex. 1) (emphasis added). Vita-Mix has contended that "when the patentee used the word 'non-symmetrical' [in the '004 patent] he did not mean 'asymmetrical' but rather was distinguishing from shapes such as circles, squares, and rectangles which have multiple lines of symmetry." *See* Opp. to Summary Judgment at 13 (Dkt. 31). Thus, granting Vita-Mix that factual assertion for purposes of summary judgment, the disclosure of "non-symmetrical" surfaces in the '004 patent encompasses any surface that does not have multiple lines of symmetry—*i.e.*, surfaces with either one line of symmetry or no lines of symmetry.[21]

By amending the '004 patent claims to narrowly specify a bottom surface periphery "having only one line of symmetry," Vita-Mix foreclosed the opportunity to invoke the DOE to recapture the other disclosed, but unclaimed, configurations, including shapes like the WildSide+ jar that have no lines of symmetry. *See Johnson & Johnston*, 285 F.3d at 1055 ("Having disclosed without claiming the steel substrates, Johnston cannot now invoke the doctrine of equivalents to extend its aluminum limitation to encompass steel."); *CSP Technologies*, 2016 WL 1118549, 543 Fed. Appx. 953, at *5 (where the claims literally applied to one-piece containers but the specification indicated "that the inventor contemplated that the one-piece and two-piece designs were alternative ways to construct a container," the "disclosure-dedication doctrine appropriately applied to bar CSP from using the doctrine of equivalents to erase this distinction[.]").

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[21] Dr. Lueptow characterized the "non-symmetrical" alternative as lacking "rotational symmetry," which encompasses any shape that has either one line of reflective symmetry or no lines of symmetry at all. *See* Lueptow Depo. at 141:19-25 (Ex. 43).

Blendtec relied on the narrow structural claim language to avoid infringement. Consequently, application of the DOE for that limitation would harshly "conflict with the fundamental principle that claims define limits of patent protection." *Johnson & Johnston*, 285 F.3d at 1054 (quoting *Charles Griener & Co. v. Mari-Med Mfg., Inc.*, 962 F.3d 1031, 1036 (Fed. Cir. 1992)). The Court should not allow Vita-Mix to use the DOE "to erase 'meaningful structural and functional limitations of the claims on which the public is entitled to rely in avoiding infringement." *Conopco, Inc. v. May Dep't Stores Co.*, 46 F.3d 1556, 1562 (Fed. Cir. 1994). For this additional reason, the DOE is not available to Vita-Mix for the "only one line of symmetry" limitation as a matter of law.

IV. CONCLUSION

Based on the foregoing undisputed facts and governing law, Blendtec respectfully asks the Court to enter summary judgment that (a) Blendtec has not infringed and does not infringe the '004 patent with the WildSide jar, (b) the WildSide+ jar and Mini WildSide jar do not literally infringe the asserted claims of the '004 patent, and (c) Vita-Mix cannot rely on the doctrine of equivalents to prove infringement as a matter of law based on any one of (i) prosecution history estoppel, (ii) claim vitiation, and (iii) the disclosure-dedication rule.

Dated this 4th day of May, 2017.

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CERTIFICATE OF SERVICE

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